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From: Larry Tainter, Director
Bureau of Quality Assurance

Subject: Responses to Questions Raised During the November 9, 1991 ETN on Advance Directives

On November 9, 1991, our office conducted a program on advance directives on the Educational Teleconference Network (ETN). During that program, participants raised a number of questions that could not immediately be answered because they required additional research. Following is a list of those questions, followed by our responses.

1. *When a guardianship is granted, is a formerly executed living will still valid after the guardianship goes into effect?*

   Wisconsin's statutes are silent regarding the hierarchy between guardianship and living wills. [This compares to s. 155.60(2) Stats. [power of attorney for health care] which explicitly allows the court granting guardianship to determine if the power of attorney for health care will remain in effect.)

   In most cases, it is expected that a guardian will agree with the provisions expressed in a living will. If the guardian disagrees with the provisions in a living will, it is not clear whose whishes should prevail and the opinion of the court would be required. A pending decision from the state Supreme Court in the case of L.W., relating to the powers of a guardian in health care decision making, may clarify this issue.

2. *If a single corporation operates a home health agency, nursing home, and hospital, does each separate agency of the corporation need to give information on advance directives when a person is admitted from one provider to another?*

   Yes.

3. *Does an adult who is being admitted to a hospital need to give the hospital a copy of his/her living will or power of attorney for health care if the hospital has a copy on file from a previous admission?*

   The regulations do not require patients to present a copy of their advance directives at the time of admission (although it is in their best interests to do so). The hospital (or other provider) is advised to ask if the copy on file is current or if changes have been made.

4. *If a person signed an older living will which stated it would expire in five years, does this document need to be re-executed or is it still valid?*

   The living will needs to be re-executed after the expiration date.

5. *Is a "fax" copy of a physician's order acceptable documentation for the withholding of care/food/fluids?*

Physician orders transmitted via a fax machine are acceptable for all providers. (However, implementation of wishes expressed in a power of attorney for health care document or a living will requires that the individual be personally examined by two physicians or a physician and a psychologist and certified as meting the conditions in the statute.)

6a. *How will the Bureau of Quality Compliance look upon "no codes" declared prior to December 1, 1991 by guardians and family members?*

6b. *What may a family/guardian execute in the form of an advance directive? Can they indicate on a check-off sheet (in advance of the need for) "CPR" or "no CPR", or choose a terminal care category? Can they only make a decision at the time of a health crisis or can they express their wishes in advance of the need for care?*

Our office considers "No codes", check-off sheets, and designations of a terminal care category as acceptable informal means of expressing one's wishes providing they are executed by an adult who has not been certified as being "incapacitated", as defined in chapters 154 and 155 of the statutes. Although indicative of an individual's wishes, these directives, unlike statutory directives, do not have the backing of the state's statutes; consequently, their validity may be challenged more easily in the courts by family members who do not agree with the directives.

In the case of an incapacitated individual, our office, from a regulatory standpoint, will not issue violations for informal advance directives (e.g., "no code" and terminal –care-category designations) executed in advance by family members, if all the family members (a) agree with the directives and (b) agree that the directives are in the individual's best interests or in accord with what the individual would want. Providers also must agree that the family's wishes are in the individual's best interests and are advised to seek guardianship if they do not agree. Having said this, you should note that from a civil liability standpoint, this area of the law (i.e., informal devolution of rights) is untested in the courts of Wisconsin; consequently, providers who honor family wishes may not have full immunity if a family member later wishes to file a lawsuit against a provider who honored a family-directed advance directive.

The ability of a guardian to direct "no code" or other types of care in advance is less clear and the Bureau defers to the pending state Supreme Court decision before responding further.

7. *Are advance directives always valid between states?*

Neither Wisconsin's statutes nor state case law address the validity in Wisconsin of advance directives made in another state. Consequently, providers may wish to discuss the validity of out-of-state directives with their attorney on a case-by-case basis.

Advance directives made under another state's laws may provide informal evidence of the individual' wishes, unless (for example) there is reason to believe the individual changed his/her mind. The Bureau's regulatory viewpoint concerning informal advance directives is noted in the response to question six.

8. *A person has authorized in his/her power of attorney for health care that the agent may admit him/her to a nursing home. The agent wishes to admit the person to a nursing home, but the individual vehemently objects. Can the health care agent admit the individual to a nursing home under these circumstances?*

The wishes of a competent/capacitated adult always supersede the directives established in a living will or in a power of attorney for health care. If the individual is competent/capacitated, his wishes supersede those of the health care agent. If the individual is certified by two physicians or a physician and a psychologist as being incapacitated, the health care agent could admit the individual to a nursing home: (a) for up to three months for recuperative care, if the individual was a hospital inpatient, is admitted directly from the hospital, and if the hospitalization was not for psychiatric care; (b) for up to 30 days for respite care if the

individual lives with the health care agent; and (c) for purposes other than those mentioned above if the individual authorized placement in a nursing home on the power of attorney for health care document and if the individual is not diagnosed as having a developmental disability or a mental illness.

A health care agent cannot admit an individual to an institute for mental diseases (IMD), a facility for the developmentally disabled (FDD), or a state treatment facility or treatment facility.

9. *How does the Bureau of Quality Compliance view "critical care plans" as an advance directive? How does the Bureau view "formal" vs. "informal" advance directives?*

The term "critical care plan" has different meanings for different providers and a review of the specific language of each would be required to issue a definitive reply. In general, the Bureau has taken the position toward informal advance directives as described in the response to questions 6a and 6b.

10. *If a resident of a nursing home leaves to go to the hospital, is on bed hold, and is not formally discharged from the nursing home, does the nursing home need to provide advance directive information upon the individual's return to the facility?*

No. This would not be an admission. However, you would want to determine if the individual executed an advance directive or changed an advance directive during his/her absence from the facility.

11. *What is the definition of "admission" for a nursing home or hospital?*

This is determined by facility policy.

12. *What rights do parents of an incapacitated child have in regard to advance directives?*

Generally parents have the right to make health care decisions until a child reaches age 18, or until a developmentally disabled child reaches age 14. In some cases, providers may believe that parental decisions are not serving the best interests of the child. If so, direction from the courts should be sought.

13. *Advance directive information is to be given "at the time of admission". What does this mean in regard to a timetable for supplying the information, especially in the hospital setting?*

Information on advance directives should be given at the time of admission, as soon as "medically feasible". If an individual is incapacitated at the time of admission and is unable to receive information or articulate his/her wishes, information on advance directives should be given when the patient is no longer incapacitated.

14. *If I as a care giver in a home health agency walk into a home and find the client, who has not been certified as incapacitated, in a comatose state and I know s/he has executed an advance directive, what do I do?*

Both chapter 154 and 155 of the state statutes require a person to be certified as "incapacitated" by two physicians (or a physician and psychologist under chapter 155) before the instructions in a living will or a power of attorney for health care instrument are implemented. This leaves a gray area for situations in which immediate care-making decisions are required and proper certification of incapacity cannot be obtained. Therefore, assuming the care giver is qualified to properly assess the situation, you should follow agency policy.

You should note that s. 155.05(2), Stats., states that a power of attorney for health care instrument takes effect upon a finding of incapacity by 2 physicians, or a physician and a licensed psychologist, unless otherwise specified in the power of attorney for health care instrument. It appears, therefore, that a person executing a power of attorney for health care instrument can waive the provision for certification of

incapacity by two physicians or a physician and a psychologist to cover situations such as this. You may wish to discuss this with your clients who have a power of attorney for health care instrument to determine if they wish to execute a new instrument which exercises this option.

15. *If a nursing home elects to change its existing policy regarding "no code", how soon does the facility need to notify its residents who were admitted prior to the effective date of this change?*

HSS 132.31(4)(b) requires notification to be made "at the time the amendment is put into effect". To avoid issues of liability, it would be preferable to alert residents of this change immediately – and even prior to the effective date of the change.

If you have further questions regarding the responses made in this memo, please contact Jerry Cabala (608-266-8482) or Sharon Sailor (608-266-1718).

LT:BH:jh ADETN3

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-Service Employees International Union
-WI Counties Assn.
-WI Medical Records Assn. Cons. Committee
-WI Assoc. of Homes and Services for Aging
-Comm. on Aging, Ext. Care Fac./HH (SMS)
-WI Assn. of Nursing Homes
-WI Assn. of Medical Directors
-Admin., Div. of Care and Treatment Facilities
-WI Assn. of Hospital SW and Discharge Planners
-Bur. Long Term Support, DCS
-WI Hospital Assn.
-Hospice Organization of WI
-Bd. on Aging and Long-Term Care
-Bur. of Design, Prof., DRL
-WI Homecare Organization